Deb Brata Das Gupta v Knight Frank & Anor

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO RL–25–102 OF 2001
RAUS SHARIF J
29 AUGUST 2005

Arbitration — Award — Setting aside — Application for — Whether arbitrator misconstrued a clause in agreement — Whether arbitrator acted in excess of jurisdiction — Whether arbitrator wrong in law in making decision on quantum

Pursuant to a management agreement entered into by the parties, the applicant agreed to pay the respondents an annual management fee in consideration of the respondents granting licenses for use of their name and providing management services to Gupta & Boyd. The respondents later terminated the licenses under cl 19(e) (ii) of the management agreement after Boyd resigned and ceased to be a partner of Gupta & Boyd. The applicant disputed the respondents' termination. The dispute was referred to an arbitrator. On 27 August 2001, the arbitrator delivered the award where he declared, inter alia, that: (i) the respondents' termination notice was valid in law and effective to terminate the license; (ii) the applicant to pay damages and costs. Dissatisfied, the applicant vide an originating motion sought the court to set aside the award pursuant to s 24 of the Arbitration Act 1952 ('the Act') or in the alternative, the award be remitted for the reconsideration of a different arbitrator pursuant to s 23 of the Act. The counsel for the applicant raised two main issues for determination, ie, (i) whether the arbitrator had misconstrued cl 5(h) of the management agreement; and (ii) whether the arbitrator had acted in excess of his jurisdiction and was wrong in law in making his decision on the quantum of management fees (damages) without strict proof.

Held, dismissing the application with costs:

(1) In the instant case, the arbitrator's interpretation of cl 5(h) is faultless. He gave sound reasons for arriving at his conclusion and even on the assumption that the arbitrator did err in his interpretation of the clause, the court was not entitled to set aside the award merely because it may take a different view on the interpretation of a document (see para 21).

(2) There was no merit on the first issue raised by applicant as the arbitrator had neither made any decision on inadmissible evidence nor applied principles of construction which were unacceptable in law (see para 22).

(3) The court in this proceedings was not in the capacity of an appellate court, therefore, it was not open for the court to reopen the award purely on the suggestion that there had been a wrong assessment of evidence by the arbitrator (see paras 25 and 26).

(4) Pursuant to s 18 of the Act, the clerical error found in the award clearly does not amount to an error of law on the face of the award which warrants setting aside the award (see para 29).

(5) The applicant did not possess tenable grounds recognized by established legal principles in support of its application to have the award referred for reconsideration or to have the award set aside for the arbitrator's misconduct of the proceeding or on the basis of errors of law on the face of the award (see para 30).

[Bahasa Malaysia summary

Mengikut satu perjanjian pengurusan yang dimasuki oleh kedua-dua pihak, pemohon bersetuju membayar kepada responden yuran pengurusan tahunan sebagai balasan kepada pemberian lesen menggunakan nama responden dan juga atas perkhidmatan pengurusan yang diberikan responden kepada Gupta & Boyd. Responden kemudiannya menamatkan lesen tersebut di bawah kl 19(e)(ii) perjanjian pengurusan tersebut selepas Boyd berhenti dan tidak lagi menjadi rakan kongsi Gupta & Boyd. Pemohon mempertikaikan penamatan responden tersebut. Pertelingkahan tersebut dirujuk kepada seorang penimbangtara. Pada 27 Ogos 2001, penimbangtara tersebut memberikan satu award di mana beliau mengisytiharkan, antara lain bahawa (i) notis penamatan responden sah disisi undang-undang dan berkesan bagi menamatkan lesen tersebut; (ii) pemohon hendaklah membayar ganti rugi dan kos. Tidak puas hati, pemohon melalui satu usul pemula memohon mahkamah mengenepikan award tersebut menurut s 24 Akta Timbangtara 1952 ('Akta tersebut') atau secara alternatif, Award tersebut dirujukkan semula untuk pertimbangan semula seorang penimbangtara yang berbeza menurut s 23 Akta tersebut. Peguamcara bagi pemohon membangkitkan dua isu utama untuk diputuskan, iaitu, (i) sama ada penimbangtara telah silap dalam mentafsirkan kl 5(h) perjanjian pengurusan tersebut; dan (ii) sama ada penimbangtara telah bertindak di luar bidang kuasanya dan adalah silap di sisi undang-undang dalam membuat keputusannya berhubung dengan jumlah yuran pentadbiran (ganti rugi) tanpa bukti yang kukuh.

Diputuskan, menolak permohonan dengan kos:

(1) Di dalam kes semasa, tafsiran penimbangtara berhubung dengan kl 5(h) tiada cacat celanya. Beliau memberikan alasan-alasan yang kukuh dalam mencapai keputusannya dan walaupun pada anggapan yang penimbangtara memang silap dalam mentafsirkan klausa tersebut, mahkamah tidak berhak untuk mengetepikan award tersebut semata-mata kerana ia mempunyai pandangan yang berbeza mengenai tafsiran sesuatu dokumen (lihat perenggan 21).

(2) Tidak terdapat sebarang merit pada isu pertama yang dibangkitkan oleh pemohon kerana penimbangtara tidak membuat sebarang keputusan berdasarkan keterangan yang tidak boleh terima ataupun mengguna pakai prinsip-prinsip tafsiran yang tidak diterima oleh undang-undang (lihat perenggan 22).

(3) Mahkamah dalam prosiding ini tidak dalam kapasiti sebagai satu mahkamah rayuan, dari itu, ianya tidak terbuka untuk mahkamah ini untuk membuka semula Award tersebut semata-mata atas usul terdapatnya satu salah tafsiran keterangan oleh penimbangtara (lihat perenggan 25–26).

(4) Menurut s 18 Akta tersebut, kesilapan perkeranian yang didapati pada award tersebut tidak merupakan kesilapan undang-undang pada muka award tersebut yang membolehkan award tersebut diketepikan (lihat perenggan 29).

(5) Pemohon tidak memiliki alasan yang kukuh yang diiktiraf dari segi prinsip undang-undang bagi menyokong permohonannya untuk merujuk award tersebut untuk pertimbangan semula atau untuk mengetepikan award tersebut atas alasan salah laku penimbangtara berhubung dengan prosiding tersebut atau atas alasan kesilapan undang-undang pada muka award tersebut (rujuk perenggan 30).]

Notes

For cases on application for setting aside of awards, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1366–1427.

Cases referred to

Future Heritage Sdn Bhd v Intelek Timur Sdn Bhd [2003] 1 MLJ 49 (refd)
Hartela Contractors Ltd v Hartecon JV Sdn Bhd & Anor [1999] 2 MLJ 481 (refd)
Intelek Timur Sdn Bhd v Future Heritage Sdn Bhd [2004] 1 MLJ 401 (refd)
Prithipal Singh v Dato Bandar, Kuala Lumpur (Golden Arches Restaurant Sdn Bhd, intervener) [1993] 3 MLJ 336 (refd)
Sharikat Pemborong Pertanian v Federal Land Development Authority [1971] 2 MLJ 210 (refd)
Union Insurance (M) Sdn Bhd v Chan You Young [1999] 1 MLJ 593 (refd)
Union of India v Rallia Ram [1963] AIR SC 1685 (refd)

Legislation referred to

Arbitration Act 1952 ss 23, 24
Federal Capital Act 1960 s 4(7)

L H Chua (Awthar Singh with him) (Fernandez & Selvarajah) for the appellant.
Lim Chee Wee (Audrey Choo with him) (Skrine) for the respondent.

Raus Sharif J:

[1] By way of an originating motion dated 5 October 2001, the applicant is seeking from this court for the following relief:

(i) that the award made on 27 October 2001 (the award) by the learned arbitrator, in an arbitration between the applicant and the respondents be set aside pursuant to s 24 of the Arbitration Act 1952 ('the Act');

(ii) alternatively, that the award be remitted for the reconsideration of a different arbitrator pursuant to s 23 of the Act.

[2] The factual background giving rise to this application are as follows. **A**

[3] On 23 July 1986, the respondents entered into a management agreement with Gupta and Boyd, a partnership firm registered in Malaysia. At the time of the agreement, the partners of Gupta and Boyd were DB Das Gupta (applicant) and one Christopher Boyd (Boyd). They were partners of Gupta and Boyd by virtue of a partnership agreement dated 23 April 1986. **B**

[4] The management agreement provided, inter alia, that in consideration of the respondents granting licenses for use of their name (insignias) and providing management services to Gupta & Boyd, the latter agreed to pay the respondents an annual management fee equal to a prescribed percentage of Gupta & Boyd's audited gross annual turnover. Their business relationship commenced on 1 March 1986. **C**

[5] However, by a letter dated 17 March 1995 the respondents terminated the licenses under cl 19(e) (ii) of the management agreement after Boyd resigned and ceased to be a partner of Gupta & Boyd. Boyd resigned and ceased to be a partner of Gupta & Boyd on 1 March 1995. **D**

[6] The applicant disputed the right of the respondents to terminate the licenses under the said clause. **E**

[7] The disputes between the parties were referred to a sole arbitrator in the name of Dato Param Cumaraswary. The issues before the learned arbitrator essentially revolve around the respondents' entitlement to terminate the licenses granted by the respondents in favour of Gupta & Boyd and the management fees and general damages for and in connection with the issue of termination. **F**

[8] On 27 August 2001, the learned arbitrator delivered the award where he declared as follows: **G**

(i) that the respondents' termination notice served on the applicant on 18 May 1995 was valid in law and effective to terminate the license;

(ii) that from 17 June 1995 until 20 January 1997 the applicant was in breach of cl 21 of the management agreement; **H**

(iii) the applicant to pay the respondents the sum of RM264,758.06 and RM34,208.93 as annual management fees due for the years ended 28 February 1995 and 29 February 1996 respectively;

(iv) the applicant to pay the respondents interest at the rate of 4% on RM264,758.06 from 1 August 1995 until date of this award and on RM34,208.93 from 19 May 1991 until the date of this award; and **I**

(v) the costs of the arbitrator to be taxed and paid by the applicant to the respondents.

[9] Arising from the above award is this application by the applicant. Before me, the learned counsel for the applicant raised two main issues for consideration and determination of this court:

(i) whether the learned arbitrator has misconstrued cl 5(h) of the management agreement; and

(ii) whether the learned arbitrator has acted in excess of his jurisdiction and is wrong in law in making his decision on the quantum of management fees without strict proof.

[10] Before addressing the above issues, it is perhaps useful to set out the parameters of the court's jurisdiction when called to interfere with arbitration's award. It has often be said that the jurisdiction to remit an award for reconsideration or to have it set aside is one which must be exercised with utmost care and deliberation. Richard Malanjun JCA (now FCJ) when delivering the judgment of the Court of Appeal in the case of *Future Heritage Sdn Bhd v Intelek Timur Sdn Bhd* [2003] 1 MLJ 49 stated it as follows (at p 57):

> … the jurisdiction to set aside or remit an arbitrator's award whether at common law or under statute is one that should be exercised with great care and with a proper sense of responsibility. One may do well to keep in mind the words of Sharma J in *Puri Construction Pte Ltd v Union of India* 1989 AIR SC 777 at p 780:
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> > When a court is called upon to decide the objections raised by a partly against an arbitration award, the jurisdiction of the court is limited, as expressly indicated in the Arbitration Act and it has no jurisdiction to sit in appeal and examine the correctness of the award on the merits.
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> (See p 489 of *Hartela Contractors Ltd v Hartecon JV Sdn Bhd & Anor* [1999] 2 MLJ 481, as per Gopal Sri Ram JCA).

[11] In the case of *Hartela Contractors Ltd v Hartecon JV Sdn Bhd & Anor* [1999] 2 MLJ 481, Gopal Sri Ram JCA stated the same but in the following words (at pp 488–489):

> So jealously did the common law guard against curial inference with private arbitrations that it was most reluctant to create exceptions to the general rule …
>
> In my judgment, the jurisdiction to set aside or to remit an arbitrator's award whether at common law or under statue is one that show be exercised with great show be exercise with great care and responsibility.

[12] A further limited exception which enable the Court to set aside an award is where the arbitrator has misconduct himself or the proceedings. The term misconduct has been defined by Raja Azlan Shah J (as he then was) in the case of *Sharikat Pemborong Pertanian v Federal Land Development Authority* [1971] 2 MLJ 210 as being the following (at p 211):

> In the law of arbitration, misconduct is used in a technical sense as denoting irregularity and not moral turpitude. It includes failure to perform the essential duties which are cast on an

arbitrator as such, for instance, failure to observe the rules of natural justice, appearance of bias and partiality. It includes any irregularity of action which is not covenant with the general principle of equity and good conscience. These illustrations are not meant to be exhaustive. But failure to analyze and appraise the evidence does not vitiate the award on the ground of misconduct. It is only when the evidence is material, relevant and had gone to effect the award that the award will be vitiated…. the plaintiff's complaint is sustainable only if the failure to do so had occasioned some irregularity causing a miscarriage of justice that is apparent on the face of the award.

[13] A further principle is that the arbitrator is the sole judge of findings of fact and whether he drew wrong inference of fact from the evidence itself is not sufficient as a ground to warrant setting aside the award. The Federal Court on *Intelek Timur Sdn Bhd v Future Heritage Sdn Bhd* [2004] 1 MLJ 401 held as follows (at p 407):

As such, if an arbitrator had erred by drawing wrong inferences of fact from the evidence before him, be it oral or documentary, that in itself is not sufficient to warrant setting aside of his award. It would be contrary to all the established legal principles relating to arbitration if an award based upon the evidence presented were liable to be reopened on the suggestion that some of the evidence had been 'misapprehended and misunderstood' per Raja Azlan Shah J (as he then was) in *Syarikat Pemborong Pertanian & Perumahan v Federal Law Development* [1971] 2 MLJ 210.

[14] It is also trite law that when dealing with the award of an arbitrator, the court is not rehearing the matter. An award is not to function as an appeal of the case on the merits. This principles was enunciated by Gopal Sri Ram JCA in the case of *Hartela* in which his Lordship cited the case of *Union of India v Rallia Ram* [1963] AIR SC1685 which reads as follows

The award in the decision of a domestic tribunal chosen by the parties, and the civil courts which are entrusted with the power to facilitate arbitration and to effectuate the awards cannot exercise appellate powers over the decision. Wrong or right the decision is binding if it reached fairly after giving adequate opportunity to the parties to place their grievances in the manner provided by the arbitration agreement.

[15] With the above principles in mind, I will now proceed to address the two grounds advanced by the applicant for consideration and determination by this court.

(i) Whether the learned arbitrator has misconstrued cl 5(h) of the management agreement

[16] The respondents contended that they have an express right under cl 19(e)(ii) of the management agreement to terminate the licenses and management services. Clause 19(e)(ii) provides as follows:

19. KFR may, by notice to Gupta, terminate the said Licenses if hereafter any of the following events occurs:

(e) If either Mr Gupta or Mr Boyd

(ii) before his normal retirement age, ie 55 years, retires (whether) because of any circumstance referred to in sub-para (i) above or for any other reason) from being engaged

A full time in the said business of Gupta, or ceases to be a partner in Gupta, or (if Gupta has been reconstituted as a company) fails to become or ceases to be a director of and shareholder in Gupta.

According to the respondents, they terminated the licenses because Boyd resigned
B and ceased to be a partner of Gupta & Boyd on 1 March 1995.

[17] However, the applicant contended that the respondents are bound by the provision of cl 5(h) of the management agreement if they are to invoke cl 19(e)(ii) properly. According to the applicant under cl 5(h) there is an overriding requirement
C that the termination shall be with just cause and excuse and shall not be tainted with mala fide.

[18] Clause 5(h) of the management agreement reads as follows:

D KFR and Bresea each severally undertakes and covenants to Gupta as follows:

(h) that it shall not without cause and excuse *or* express right given by this agreement terminates the license and management services herein agreed to be granted and provided by it. (Emphasis added.)

E

[19] Thus, the applicant contended that the word 'or' in cl 5(h) of the management agreement should be read conjunctively. The case of *Prithipal Singh v Dato Bandar, Kuala Lumpur (Golden Arches Restaurant Sdn Bhd, intervener)* [1993] 3 MLJ 336 was relied upon to support the applicant's preposition. In that case the Supreme Court
F was dealing with s 4(7) of the Federal Capital Act 1960 which reads follows:

where the Commissioner is prevented from carrying out his functions, …, the Secretary General of the Ministry of the Federal Territory, *or* such other public officer as … (Emphasis added.)

G The then Supreme Court held the significance of the comma cannot be ignored because without the comma, the words 'Secretary General' and 'public officer' must be read conjunctively, but with the comma, these words must be read disjunctively. Thus, it was argued on behalf of the applicant that since in cl 5(h) of the management agreement, there is no comma after the words 'without just cause and
H excuse' and before the word 'or' therefore applying the principle in Prithipal Singh the words or must be read conjunctively.

[20] On this issue the learned arbitrator expressed his views as follows:

I I am of the view, and I determine so, that cl 5(h) must be constituted in its natural and ordinary meaning. The word 'or' in that clause must be construed disjunctively. To do otherwise would do violence the word 'or' in its context as said in the High Court and approved by the Court of Appeal in *Union Insurance (M) Sdn Bhd v Chan You Young* [1999] 1 MLJ 593. The clause gave the respondents the option to termination the license and management service either when there was just cause and excuse or upon reliance on express

contractual right to terminate. In other words, the respondents could terminate the licence and management services when:

(a) anyone of the specific contractual events entitling the respondent to terminate had accrued; or

(b) the respondents otherwise has some just cause and excuse.

[21] To me, the learned arbitrator interpretation of cl 5(h) is faultless. He gave sound reasons for arriving at his conclusion. But quite apart from the reasons of the learned arbitrator on this issue, even on the assumption that the learned arbitrator did err in his interpretation of the clause this court is not entitled to set aside the award merely because it may take a different view on the interpretation of a document. The Court of Appeal in *Future Heritage* quoted an extract from *Halbury's Laws of England*, Vol 2 (4th Ed) at para 623 as follows:

> … and where the question referred for arbitration is a question of construction which is generally a question of law the arbitrator's decision cannot be set aside only because the court itself would have come to a deferent(different?) conclusion, but it appears on the face of the award that the arbitrator has proceeded illegally, as for instance by deciding on evidence which was inadmissible or on principle of construction which the law does not countenance, there is an error of law which may be ground for setting aside the award.

[22] To me, the learned arbitrator has neither made any decision on inadmissible evidence nor applied principles of construction which are unacceptable in law. Accordingly, I find there is no merit on first issued raised by the applicant.

(ii) Whether the learned arbitrator has acted in excess of his jurisdiction and is wrong in law in making his decision on the question of management fees without strict proof

[23] In order to understand the argument of the applicant, it is necessary to examine what was decided by the learned arbitrator with regard to management fee payable by the applicant to the respondents. The learned arbitrator held as follows:

> Having considered the evidence and the submission, I am satisfied and so determine, that the respondents had provided the management services within the parameters of the management agreement and the applicant had the use of the licenses and as such they are entitled to the outstanding management fees up to the date of termination with regard to the management fee for the year ended 28 February 1995, the audited report for the year provide as an administration expense item a sum of RM228,079 as management fee for that year. Through he respondent submitted for a higher figure yet they concluded to accepting this figure as an admitted figure.
>
> I therefore, determine that the management fee payable by the claimant to the respondent for that year to be RM228,079.

With regard to the management fee for the period between 1 March 1995 to 18 May 1995 (the date of termination of the license) rather than divert accounts to be take of the actual turnover for that short period it is fair to apportion the turnover for the whole of that financial year. It was in evidence before me that the turnover for the period ended February 1996 was RM2,592,228. The apportionment of this figure for the 69 days excluding the day of termination would be taken to be 69/366 then

of RM2,592,228. That would be RM488,699. Therefore I find, and so determine, that the management fee of 7% payable for the period would be RM34,208.93.

[24] The applicant contended that the sum of RM288,079as the management fee arrived at by the learned arbitrator was based on an unsigned accounts in draft form. With regard to the management fee for the period from 1 March 1995 and 18 May 1995 (69) days the applicant contended that the learned arbitrator accepted uncritically as correct that the turnover for the period ending 29 February 1996 was RM2,592,288 and apportioned the turnover for 69 days as RM488,699. To the applicant, the award on management fees was flawed as the respondents have not strictly proven the question of the management fees as claimed by the respondents in the counter claim. Further, according to the applicant that the auditors who prepared the account were not called to give evidence.

[25] With respect, I am unable to agree with the applicant. To me, the findings made by the learned Arbitrator are findings of fact before him at the arbitration proceedings. This court does not 'wear the mantle' of an appellate court in this proceedings and that it is not open for the court to reopen an award of arbitration purely on the suggestion that there as been a wrong assessment of evidence by the learned arbitrator.

[26] To me, the learned arbitrator had scrutinized the evidence of both parties and made a reasonable determination. It is not the task of this court to scrutinize every piece of evidence adduced before the learned arbitrator and make another finding of fact. Accordingly, I find no merit on the applicant's second ground to set-aside the award.

[27] The applicant further contended as an additional issue that there is error on the face of the award in that the learned arbitrator at p 15 of his award determined that the management fee payable by the applicant to the respondents to be RM228.079. But at para (iii) and (iv) of pp 16 and 17 of the award, the learned arbitrator referred the sum to be RM264.758.06.

[28] Looking at the award as a whole, I am of the view that the sum stipulated RM264,758.06 as management fee payable by the applicant to the respondents is a clerical error. The right sum is RM228,079 as determine by the learned arbitrator. In fact the clerical mistake was admitted by the learned Arbitrator in response to the letter of the respondents' solicitor dated 3 October 2001, pointing to the clerical error. In the letter dated 9 October 2000 the learned arbitrator stated as follows:

> In light of the reasons I gave in p 15 for the award of RM228,079 as management fee for the year and that 28 February 1995 instead of the sum of RM264,758,06 claimed by the respondent the figure RM264,758.06 stated in paras (iii) and (iv) in pp16 and 17 of the award should read RM228,079.

[29] I am of the view the above clerical error clearly does not amount to an error of law on the face of the award which warrants setting aside the award, s 18 of the Act can be relied upon to correct the error. It reads as follows:

Unless a contrary intention is express in the arbitration agreement, the arbitrator or umpire shall have the power to convert in an award any clerical mistake or error from an accidental slip or omission.

[30] In conclusion, I am of the view that the applicant does not possess tenable grounds recognized by established legal principles in support of its application to have the award referred for the learned arbitrator's reconsideration or to have the award set aside for the arbitrator's misconduct of the proceeding or on the basis of errors of law on the face of the award.

[31] For the above reasons, I had, on 17 May 2005 dismissed the applicant's application with costs and made a further order that the award be remitted to the learned arbitrator to correct the clerical error as stated above.

Application dismissed with costs.

Reported by I Izzuddin